Supreme Court, U.S.
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No. 93-426

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PACIFIC LIGHTING CORP., FREDRICKS DEVELOPMENT CORP. and DUNN PROPERTIES CORP.,

Petitioners,

v.

MGW, INC.,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District

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REPLY MEMORANDUM

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REPLY MEMORANDUM

Respondent MGW, Inc.'s 19-page brief in opposition to certiorari cannot overcome a simple, unassailable and exceedingly unfortunate fact: the highest court in the Nation's largest State was on the brink of scrutinizing its punitive damage system for constitutional defects when this Court decided *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), but dismissed this case and three others only days after *TXO* as "improvidently granted." Pet. App. 1a. A misconstruction of the meaning of *TXO*, not any state law "procedural shortcomings," Opp. at 2, is the only conceivable explanation for these actions. *See* Petition at 4, 6-7.

Indeed, *all* of the federal due process issues presented by this case were fully argued and expressly decided by the California Court of Appeal. *See* Pet. App. 16a-32a.[1] The Court of Appeal squarely and unequivocally rejected petitioners' argument that California's standardless, wealth-based model jury instruction violated the Due Process Clause as interpreted by this Court in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), holding that that instruction included sufficiently "objective factors designed to effect the policies behind such awards," Pet. App. 18a, and that it was proper "for the jury to consider the defendants' wealth." Pet. App. 21a. It also upheld as constitutional California's post-verdict review procedures, including its "passion or preju-

[1] The other three punitive damage cases that the California Supreme Court dismissed as improvidently granted after *TXO*, *see* Petition at 4 n.2, raised the identical and other closely related due process issues that had been explicitly decided by the California Court of Appeal.

dice" standard of appellate review. *See, e.g.*, Pet. App. 18a-19a.

Accordingly, it is frivolous for MGW to contend throughout its brief that this Court should deny certiorari "for failure to preserve issues." Opp. at 2, 11, 17.[2] As this Court has repeatedly held, "[t]here can be no question as to the proper presentation of a federal claim when the [court below] passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959); *see also Cohen* v. *Cowles Media Co.*, 111 S. Ct. 2513 (1991) (same); *Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979) (same); *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974) (same). Moreover, MGW's "waiver" arguments are flatly inconsistent with California law as well. *See, e.g., Adams* v. *Murakami*, 54 Cal. 3d 105, 115 n.5 (1991) (rejecting plaintiff's waiver arguments concerning defendant's challenge to proper procedures for imposing punitive damages because "the primary interest that must be protected is the public interest in punitive damages awards in appropriate amounts. We cannot allow the *public* interest to be thwarted by a defendant's oversight or trial tactics.") (emphasis in original).

MGW also argues at length on the merits that the California punitive damage system and the $2,000,000 award that it produced here comport with the Due Process Clause as interpreted in *TXO*. *See, e.g.*, Opp. at 7-10, 12-16. This Court should grant certiorari, vacate the judgment below and remand this case so that the California courts may address that question

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[2] MGW unsuccessfully advanced these exact arguments in opposition to petitioners' first certiorari petition in this case (No. 90-626), which the Court granted. *See* Pet. App. 34a.

in the first instance, and also to make clear that, particularly after *TXO*, the courts continue to bear constitutional responsibility for ensuring that their respective punitive damage regimes include fair procedures that protect against arbitrary and unreasonable punishments.

October 20, 1993

Respectfully submitted,

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